REGIONAL CENTRE FOR ARBITRATION *a*

v.

OOI BENG CHOO & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR *b*
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-29-1995]
11 NOVEMBER 1998

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Decision of Industrial Court to overrule preliminary objection that applicant entitled to immunity from suit - Applicant claimed immunity based on agreement - Agreement neither signed nor executed and not available at time of preliminary objection - Whether Industrial Court justified to overrule objection in the circumstances - Agreement admitted as fresh evidence before High Court - Whether High Court could decide on issue of immunity in judicial review - Whether a matter to be re-adjudicated before Industrial Court* *c* *d*

LABOUR LAW: *Industrial Court - Decision - Decision to overrule preliminary objection that applicant entitled to immunity from suit - Applicant claimed immunity based on agreement - Agreement neither signed nor executed and not available at time of preliminary objection - Whether Industrial Court justified to overrule objection in the circumstances* *e*

The was an application for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 to quash the award of the Industrial Court.

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The respondent had filed a complaint of dismissal without just cause and excuse against the applicant in the Industrial Court. The applicant raised a preliminary objection as to the jurisdiction of the Industrial Court to hear the dispute. Being an international organisation, the applicant claimed that it was entitled to immunity from such proceedings based on the agreement between the Government of Malaysia and the Asian-African Legal Consultative Committee ('the agreement'). The Industrial Court overruled the said objection as the said court was not able to conclude on the validity of the agreement as it was not executed and signed. Also, the agreement was not available at the time of the preliminary objection. However, prior to this instant application, the agreement was admitted as fresh evidence in another suit and was held to be relevant on the issue of the immunity of the applicant. *g* *h*

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Held:

[1] The Industrial Court was not erroneous in its decision-making process. Its conclusion was strictly based on the available evidence before it. The agreement was not in existence before the Industrial Court then when it handed down its award.

[2] The questions in relation to the applicant's immunity were matters which related to the merit of the claim. In the absence of any error of law in the decision-making process of the Industrial Court, it was not for this court in judicial review to decide the claim of immunity. It was a matter for the Industrial Court to decide even though the issue raised was a question of law respecting jurisdiction.

[3] With the fresh evidence, the issue of immunity could be re-adjudicated by the Industrial Court as the Industrial Court had not completed its hearing of the dispute which was halted because of the preliminary objection.

[4] Although this application could expedite the proceedings as the materials were already before this court to decide on the issue of immunity, this court must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration of the merit as if on appeal. The Industrial Court should be allowed to hear the dispute between the parties to its conclusion.

[Application dismissed.]

Case(s) referred to:

Enesty Sdn Bhd v. Transport Workers Union [1986] 1 MLJ 18 ***(refd)***
Haji Sarip Ahmad v. Patco Malaysia Bhd [1991] 1 MLJ 354 ***(refd)***
Ho Kiang Ngan v. Mahkamah Perusahaan Malaysia [1994] 4 CLJ 687 ***(refd)***
Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 ***(refd)***
National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour and Manpower [1980] 2 MLJ 189 ***(refd)***
Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 AMR 433 ***(refd)***
Regional Centre for Arbitration v. Ooi Beng Choo & Anor [1999] 1 CLJ 819 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s 20
International Organisations (Privileges and Immunities) Act 1992, ss. 3, 4
Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996, regs. 1, 3
Rules of the High Court 1980, O. 53

For the applicant - Romesh Abraham (CM Teng with him); M/s Shook Lin & Bok
For the respondent - Anand Ponnudurai (P Gananathan with him); M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

This is an application for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 to quash the Industrial Court Award No. 555 of 1994.

Briefly, the facts are that Ms. Ooi Beng Choo ('the respondent') was engaged as a research officer with the Regional Centre for Arbitration ('the applicant') and her services were terminated on 23 December 1992. She filed a complaint under s. 20 of the Industrial Relations Act 1967 ('the Act') for dismissal without just cause or excuse seeking reinstatement to her former position with the applicant. At the hearing before the Industrial Court on 11 November 1994 the applicant raised a preliminary objection as to the jurisdiction of the Industrial Court to hear the reference on the ground that the applicant, being an international organisation was entitled to immunity from such proceedings. The Industrial Court overruled the objection and held that the court had the jurisdiction to hear the dispute between the applicant and the respondent. The learned Chairman of the Industrial Court came to that conclusion after holding that the agreements between the Government of Malaysia and the Asian-African Legal Consultative Committee (the AALCC) had not been executed and as such the Industrial Court was unable to conclude as to their validity. This is what the learned Chairman said at 2nd para p. 10 of award:

> ... it should also be noted that exhibit 'C' and exhibit 'D' bearing the dates 29th July 1981 and 1991 respectively, which purport to be copies of the Agreement between the Government of Malaysia and the Asian-African Legal Consultative Committee and the Supplementary Agreement have not been executed and as such the court is unable to conclude as to their validity whether these Agreements have been agreed to, finalised and signed by the parties is questionable...

At p. 12 second para of the award, the learned Chairman continued:

> .... by virtue of clause 7(b) in exhibit 'C' and clause 2.2(b) in the exhibit 'D' it (Applicant) is entitled to immunity. As these documents are not signed I agree with the Claimant's (Respondent's) counsel that they should not be considered ... after considering the documents as a whole, it is the Court's finding that the "immunity" which is referred to there is that which pertains to suits, legal or judicial process in relation to the exercise of the Company's (applicant's) functions as a centre for arbitration. What is before the Court is

a reference under the Act, which is not a suit, legal process or judicial proceeding.

Prior to this substantive application for *certiorari*, this court, on the application by the applicant, admitted the agreement between the Government of Malaysia and the AALCC, which was only executed of 29 February 1996 (the 1996 agreement), as fresh evidence, and this decision was reported in [1998] 2 MLJ 382 and [1998] 2 AMR 2282. In that case, I held that the 1996 agreement is relevant on the issue of the immunity of the applicant and hence the jurisdiction of the Industrial Court. The 1996 agreement contained provisions relating to privileges and immunities of the applicant as stated in article III cl. 1 thereof which reads as follows:

The Centre (*ie*, the applicant) shall enjoy such privileges and immunities as may be necessary for the purpose of executing its function including immunity from suit and legal process.

This 1996 agreement also stated that under art. VII, the agreement is valid for a period of five (5) years as from 1 January 1992. The significance of these two articles is that, at the time of termination of the respondent, *ie*, 23 December 1992, there was a specific and express clause in the 1996 agreement providing the applicant the immunity from suit and legal process. Besides this 1996 agreement, there is also before this court, a subsidiary legislation known as the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 (the Regulations) made pursuant to ss. 3 and 4 of the International Organisations (Privileges and Immunities) Act 1992 ('the 1992 Act'). It is provided under reg. 1 that the Regulations shall be deemed to have come into force on 17 March 1992. Regulation 3 provides that the centre (*ie*, the applicant) shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and shall also have the privileges and immunities specified in the First Schedule of the 1992 Act. Paragraph 1 to the First Schedule states:

Immunity of the organization, and of the property and assets of, or in the custody of, or administered by, the organization, from suit and from other legal process.

Mr. Romesh Abraham, leading counsel for the applicant, submitted that on all the material available before this court, there is ample basis to establish that the applicant should be immune from all proceedings including the respondent's claim for dismissal without just cause or excuse in the Industrial Court and accordingly, he asked for an order of *certiorari* to be issued.

Mr. Anand Ponnudurai for the respondent, in opposing the application, argued forcefully that by reason of the Supreme Court's decision in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 2 MLJ 685, the preliminary objection relating to immunity is a matter that should be disposed of by the Industrial Court at the trial and to this extent the issue should be remitted back to the Industrial Court. He claimed that since there was no error in the decision-making process of the Industrial Court, the application for *certiorari* must be dismissed with costs.

In Kathiravelu, *supra*, the Supreme Court held that "the threshold jurisdiction of the Industrial Court may only be challenged by seeking to quash the Minister's reference and in the same application ask for an order of prohibition against that court. The threshold jurisdiction of the Industrial Court could not be challenged without joining the Minister and seeking relief against him, Also, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court to be made by way of a preliminary objection. This was because the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objection to the threshold jurisdiction to be taken would only delay industrial adjudication." (see held (2) at p. 686).

It is worthy to note that this Supreme Court case was decided on 6 January 1997 whereas the preliminary objection in our case was raised and argued, and subsequently overruled by the Industrial Court on 16 December 1994, well before the ruling. Surely, in the circumstances of this case the ruling of the Supreme Court with regard to the challenge to the threshold jurisdiction cannot be taken as applying to cases which have already been decided before *Kathiravelu*. In fact, the practice of challenging the threshold jurisdiction of the Industrial Court prior to the decision in *Kathiravelu*, is by raising preliminary objection and this practice has been judicially recognised as correct by both the Supreme Court and the Federal Court. See for instance the Supreme Court decisions in *Enesty Sdn Bhd v. Transport Workers Union* [1986] 1 MLJ 18 per Azmi SCJ; *Haji Sarip bin Ahmad v. Patco Malaysia Bhd* [1991] 1 MLJ 354 per Edgar Joseph SCJ and the Federal Court decision in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 per Gopal Sri Ram JCA. Therefore, based on the law as it then stood, this court is not prevented to consider the substantive motion on its merit.

Having given the counsel's submissions and the authorities cited by them my utmost consideration, I hold that there is much merit in the respondent's submission. First and foremost, it must be emphasized at the outset that this is not an appeal but an application to review the decision made by the Industrial Court by way of *certiorari* proceedings. This court is more concerned

with the decision-making process and not the decision itself. It is trite law that the High Court is not entitled to utilise *certiorari* proceedings as a cloak to entertain an appeal against findings of fact. (See *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235). This is not a case where there is no evidence to support the conclusion reached by the Industrial Court. The evidence with regard to immunity which was available before the Industrial Court then left much to be desired. The agreement was not signed and executed and as such, the learned Chairman was justified in refusing to consider the question of the applicant's immunity on the preliminary objection.

Mr. Romesh Abraham urged upon me to decide on the issue of immunity as the 1996 agreement and the Regulations which were made as the result of the 1996 agreement but were not available before the Industrial Court, are already before me and therefore, it would serve no real purpose if the matter were to be remitted to the Industrial Court to make the ruling on the issue and he cited *Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433 in support. With respect, I cannot agree with him. On the facts of the present case, the Industrial Court was not erroneous in its decision-making process, and as I see it, its conclusion was arrived strictly based on the available evidence before it. The 1996 agreement and Regulations were not in existence before the Industrial Court when it handed down its award in 1994. In my view, the questions whether or not the 1996 agreement and the Regulations are applicable to the applicant's immunity are matters which relate to the merit of the claim. In my judgment, in the absence of any error of law in the decision-making process of the Industrial Court, it is not for this court in judicial review to decide the claim of immunity. It is a matter for the Industrial Court to decide, even though the issue raised is a question of law respecting jurisdiction. With the fresh evidence and the Regulations, the issue of immunity can be readjudicated by the Industrial Court. It is to be noted that the Industrial Court has not completed its hearing of the reference. The reference was halted because of the preliminary objection. It is true that this application can expedite the proceeding as the materials are already before the court to decide on the issue of immunity, but this court must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration of the merit as if on appeal (see *National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189).

In the present case, I decide to dismiss the application and thus, there is no basis for this court to grant the appropriate relief that the applicant is immune from suit and legal process as suggested by the applicant. Yang Amat Arif Mohd Eusoff bin Chin, the Chief Justice, Malaysia in the Federal Court case of *Rama Chandran, supra,* at p. 467 line 5 ruled:

If the application for *certiorari* is dismissed, that ends the matter, but if the application is allowed, the court has surely to mould the order.

Since the Industrial Court has committed no error of law, there is no justification for this court to interfere with the Industrial Court's decision. The Industrial Court should be allowed to continue to hear the dispute between the parties to its conclusion. Accordingly, I dismiss the application for *certiorari* with costs to the respondent.